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No. 85-732

In the Supreme Court of the United States

OCTOBER TERM, 1986

WESTERN AIR LINES, INC., ET AL., APPELLANTS

v.

BOARD OF EQUALIZATION OF THE STATE OF SOUTH DAKOTA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Under 49 U.S.C. App. 1513(d)(3), the provisions of Section 1513(d)(1) "shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes." The first question presented is whether the status of a state tax as an "in lieu tax which is wholly utilized for airport and aeronautical purposes" is governed by state or by federal law.

2. If federal law governs this determination, whether the South Dakota Airline Flight Property Tax, S.D. Codified Laws Ann. ch. 10-29 (1982), is an "in lieu tax" within the meaning of Section 1513(d)(3).

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This brief is submitted in response to the Court's order of November 17, 1986, inviting the Solicitor General to express the views of the United States.

STATEMENT

1. These are consolidated suits brought by appellants, four interstate air carriers, seeking refund of state taxes imposed for the years 1982 and 1983 upon an apportioned fraction of the value of "flight property" used in South Dakota. South Dakota's "flight property tax," like its taxes levied on nine other categories of public utility companies, is centrally as-

sessed by the state's Department of Revenue. S.D. Codified Laws Ann. chs. 10-28 through 10-37 (1982). Appellants contend that this tax violates the limitations on state taxation of interstate airlines established by Congress in 49 U.S.C. App. 1513(d).

Section 1513 was enacted in 1973 to address congressional concern that state taxation of airlines was unreasonably burdening interstate commerce. The statute as originally enacted expressly prohibited the imposition of specific types of taxes, including head taxes and gross receipts taxes, on interstate airlines. See 49 U.S.C. App. 1513(a); see generally *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7, 8-10 (1983). In 1982, Congress added Section 1513 (d), the provision at issue here, to address another form of state taxation that it viewed as unreasonably burdening interstate commerce. That subsection generally prohibits a state from imposing an ad valorem tax on air carrier transportation property at assessed values or rates higher than those applicable to other commercial and industrial property of the same type. Section 1513(d)(3) provides, however, that "[t]his subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes."

The South Dakota flight property tax was passed in 1961. It provides that "flight property" (defined as fully equipped aircraft used in interstate transportation) "shall be assessed for the purpose of taxation by the department of revenue and not otherwise." S.D. Codified Laws Ann. § 10-29-1(4) (1982). It thus excludes "flight property" from the general South Dakota scheme of local property tax assessment at the county level (*id.* § 10-3-16). The statute establishes a complicated formula (based on flight

tonnage, flight time, and revenue ton miles) for determining the portion of the aircraft's value that is subject to South Dakota tax (*id.* § 10-29-10). That value is then taxed at the state's "average mill rate" (*id.* § 10-29-14). Finally, the statute provides that all revenues from this tax are to be allocated to the airports where the taxed airline companies make regularly scheduled landings and "shall be used exclusively by such airports for airport purposes" (*id.* § 10-29-15).

In 1978, South Dakota exempted from ad valorem taxation all personal property—chiefly householders' property and business inventories—that was locally rather than centrally assessed. The statute effecting that exemption specifically provided, however, that it did not "impair or repeal any tax or fee authorized to be levied or imposed in lieu of personal property tax" (S.D. Codified Laws Ann. § 10-4-6.1 (1982)). Thus, while exempting airlines' locally-assessed personal property from tax (J.S. App. 7a n.1), it is unquestioned that the 1978 amendment left in place the centrally-assessed tax on airline "flight property," as well as the state's other centrally-assessed taxes on public utility companies. Appellants' contention is that the resulting South Dakota tax structure, in which the centrally-assessed flight property tax continues to be collected, but the locally-assessed personal property tax is no longer collected, violates Section 1513(d).

2. The South Dakota circuit court rejected appellants' contention that the flight property tax violates federal law (J.S. App. 13a-21a). The court held that the tax was an "in lieu tax which is wholly utilized for airport and aeronautical purposes" within the meaning of 49 U.S.C. App. 1513(d)(3). The court noted that South Dakota had chosen to tax a number

of utilities, such as railroads, pipelines, telephone companies, electric companies, water companies, express companies and "private car-line companies," by assessing their property on a unit basis rather than by means of the generally applicable method of local assessment. See J.S. App. 20a, citing S.D. Codified Laws Ann. chs. 10-28 through 10-37 (1982). The court held that all of these centrally-assessed taxes constitutes "in lieu taxes" within the meaning of the federal statute, emphasizing that they had been so characterized by the South Dakota legislature when it preserved them upon eliminating the locally-assessed tax in 1978. See J.S. App. 19a-20a, quoting S.D. Codified Laws Ann. § 10-4-6.1 (1982). In the circuit court's view, the airline flight property tax was one example of South Dakota's "in lieu taxes" on utilities, and, because the proceeds of the tax are devoted exclusively to airport purposes, the court concluded that it fell within the proviso of Section 1513 (d)(3) and hence was not prohibited by Section 1513(d). J.S. App. 19a-20a.[1]

The Supreme Court of South Dakota affirmed on a different ground, one judge dissenting (J.S. App. 1a-11a). It stated that the federal statute "essentially prohibits a discriminatory tax rate as between air carrier property and other commercial and industrial property," with the latter being defined as "property * * * devoted to a commercial or industrial use and *subject to a property tax levy*" (J.S. App. 7a (emphasis in original), citing 49 U.S.C.

[1] In an administrative proceeding to abate collection of the flight property tax, the South Dakota Board of Equalization had previously concluded that the tax was an "in lieu tax" governed by the Section 1513(d)(3) proviso (J.A. 30-31).

App. 1513(d)(2)(D)). Because South Dakota had exempted locally-assessed personal property from ad valorem tax in 1978, the court concluded that such property was not "subject to a property tax levy" within the meaning of Section 1513(d)(2)(D), and hence that it should not be taken into account for purposes of the comparison mandated by Section 1513(d)(1). And because there was no contention that airline flight property was assessed or taxed at a rate higher than other centrally-assessed property, the court concluded that the flight property tax satisfied the federal statutory strictures (J.S. App. 6a-9a).[2]

As a preliminary matter, however, the South Dakota Supreme Court rejected the circuit court's conclusion that the flight property tax was governed by the proviso of Section 1513(d)(3). The supreme court expressed the view that an "in lieu tax" must be "a substitute for" another existing tax (J.S. App. 5a). The court concluded that the flight property tax did not qualify under that definition because it was the first personal property tax imposed upon aircraft in South Dakota, such airframes having been immune from tax prior to 1961. See *id.* at 5a-6a. Because the flight property tax upon its enactment in 1961 was "an additional tax to the personal property taxes theretofore existing" (*id.* at 6a), the court held that the tax did not qualify as an "in lieu tax" within the meaning of 49 U.S.C. App. 1513(d)(3).

[2] We have not been requested to address this question and take no position in this brief on whether this aspect of the South Dakota Supreme Court's decision correctly interprets the federal statute.

ARGUMENT

A. The Question Whether A State Tax Is An "In Lieu Tax Which Is Wholly Utilized For Airport and Aeronautical Purposes" Within The Meaning of 49 U.S.C. App. 1513(d)(3) Is One Of Federal Law

When Congress employs a descriptive phrase in enacting a federal statute, the fact that the application of the statute is nationwide gives rise to a strong presumption, absent some plain indication to the contrary, that the statute should be applied uniformly throughout the Nation, and not be dependent upon the vagaries of local terminology or upon the varieties of state law. *Jerome* v. *United States*, 318 U.S. 101, 104 (1943). Thus, the meaning of the words used in a federal statute is generally a question of federal law, albeit one that may require some inquiry into the particular situation existing in a particular state.

The Court has recognized this basic principle in a variety of contexts. For example, when the incidence of the federal estate tax depended upon the existence of a "general power of appointment" (see I.R.C. § 2041(b)(1)), the fact that a particular power of appointment was "special" under state law was not dispositive. Rather, the meaning of the phrase was held to be a federal question "no matter what name is given to the interest or right by state law." *Morgan* v. *Commissioner*, 309 U.S. 78, 81 (1940). The Court has similarly held that, while "state law controls in determining the nature of the legal interest" that a taxpayer has in property (*Aquilino* v. *United States*, 363 U.S. 509, 513 (1960)), the question whether "a state-law right constitutes 'property' or 'rights to property,'" as those words are used in Section 6331 of the Internal Revenue Code, governing levies, "is a matter of federal law." *United States* v.

National Bank of Commerce, No. 84-498 (June 26, 1985), slip op. 13. See also *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 111-112 (1983); *Chase Manhattan Bank* v. *Finance Administration*, 440 U.S. 447, 449 (1979); *NLRB* v. *Natural Gas Utility District*, 402 U.S. 600, 602-604 (1971); *First Agricultural Nat'l Bank* v. *Tax Commission*, 392 U.S. 339, 347 (1968).

In this case, it seems particularly clear that the construction of 49 U.S.C. App. 1513(d) presents solely a federal question because that statute, like its analogues with respect to railroads (49 U.S.C. 11503) and motor carriers (49 U.S.C. 11503a), was designed to produce some measure of equal treatment in an area where, absent federal legislation, this Court has held that the Constitution did not require equality of treatment. See H.R. Conf. Rep. 97-760, 97th Cong., 2d Sess. 722 (1982); compare *Nashville C. & St. L. Ry.* v. *Browning*, 310 U.S. 362, 367-369 (1940). That congressional purpose would be substantially undermined if a state's characterization of its tax were conclusive upon the meaning of the federal statute. Indeed, this Court has already held, in connection with another subsection of 49 U.S.C. App. 1513, that a state's characterization of its tax does not control the interpretation of the federal law. *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. at 13-14. Thus, we think it clear that the question whether the South Dakota flight property tax is an "in lieu tax" within the meaning of 49 U.S.C. App. 1513(d)(3) is one of federal law.[3]

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[3] We note our belief that the question whether South Dakota's tax can be sustained under the Section 1513(d)(3) proviso, although not originally briefed by the parties in this

B. The South Dakota Flight Property Tax Is An "In Lieu Tax" Covered By The Proviso Of 49 U.S.C. App. 1513(d)(3)

We are frank to admit that the meaning of the term "in lieu tax" as used in Section 1513(d)(3) is not without ambiguity. The proviso containing that phrase was added to the statute in conference, and there is no legislative history that specifically addresses it. Nor does the term "in lieu tax" have a well-established meaning elsewhere in the United States Code that can reasonably be imported here. Whether one is operating in English or in French, the meaning ascribed to the term by the court below —namely, a substitute for a pre-existing tax actually imposed upon the taxpayer—would not seem irrational as an abstract matter. In light of the overall purposes of Section 1513(d), however, and in light of the particular context in which the term is used here, it is our view that a broader interpretation of "in lieu tax" is by far the better reading of the statute. We submit that when a state imposes upon a taxpayer a special form or method of taxation in place of that generally imposed (whether or not the taxpayer at that time had been subjected to the generally applicable tax), the tax is an "in lieu tax" for purposes of Section 1513(d)(3). Accordingly, the South Dakota flight property tax is an "in lieu tax" within the meaning of that statute.

1. As the legislative history indicates (see H.R. Conf. Rep. 97-760, *supra*, at 722), Section 1513(d) was enacted in order to extend to airlines the protection against burdensome state taxation that had

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Court, is properly before this Court as an alternative ground for affirmance. That question was briefed, argued, and considered in both courts below.

previously been conferred upon motor carriers and railroads. This provision, like its predecessors, was addressed to a specific problem—the imposition by states of ad valorem property taxes that discriminated against interstate carriers, either by assessing their property at disproportionately high values or by taxing them at higher rates than those applicable to other commercial and industrial enterprises. Congress explained that "interstate carriers * * * are easy prey for State and local tax assessors" because they "are non-voting, often nonresident targets for local taxation, and cannot easily remove their right-of-way and terminals." S. Rep. 91-630, 91st Cong., 1st Sess. 3 (1969). Congress declared that these discriminatory tax practices directed against interstate airlines "unreasonably burden and discriminate against interstate commerce" (49 U.S.C. App. 1513(d)(1)).

While Congress found that states had often discriminated against interstate carriers through the application of their general property tax regimes in the manner specifically proscribed by Section 1513(d)(1), Congress recognized that there were other ways in which state taxes could discriminate in a fashion that would unreasonably burden interstate commerce. Many states had imposed special taxes, particularly on utilities and common carriers, that operated differently from the standard ad valorem property tax because of the peculiarities of valuing property in those industries. Congress recognized that such differential classification of interstate carriers—that is, exempting them from the generally-applicable ad valorem property tax and subjecting them to sui generis tax regimes—could become a disguise for discrimination. Congress accordingly de-

leted from the railroad nondiscrimination statute (49 U.S.C. 11503) a provision that would have made it inapplicable where such differential classifications were set forth in the state's constitution. See S. Rep. 94-595, 94th Cong., 2d Sess. 166 (1976). As an earlier House Report stated (H.R. Rep. 94-725, 94th Cong., 1st Sess. 78 (1975) (emphasis added)):

> In view of the generally poor economic condition of the railroad industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, the Committee believes that discriminatory property *and "in lieu" taxation* should be ended.

Thus, Congress appears to have viewed these special industry taxes as "in lieu taxes" and recognized that they could burden interstate commerce. On the other hand, in the airline context, Congress has made the judgment in Section 1513(d)(3) that a certain class of in lieu taxes—taxes "wholly utilized for airport and aeronautical purposes"—should be excluded from the mathematical comparison standard of Section 1513(d)(1) because they do not burden interstate commerce.

The South Dakota tax scheme well illustrates the interplay between generally applicable ad valorem taxation and specialized methods of taxation for individual industries. The South Dakota Constitution, Article XI, § 2, authorizes the legislature to classify property for purposes of taxation. Section 10-3-16 of the South Dakota Codified Laws Annotated provides that each county shall be an assessment district, which shall assess for taxation all property situated in the county that is subject to taxation, except property that the Department of Revenue has been directed to assess. Other provisions of Chapters 10-3 and 10-6 set forth a comprehensive administrative procedure applicable to locally-assessed taxes.

In place of the local assessment of ad valorem taxes generally applicable, however, ten distinct chapters of the South Dakota statutes impose ten different systems of centrally-assessed taxation with respect to some or all of the property of ten specified types of enterprise, to the exclusion of the otherwise applicable locally-assessed ad valorem taxes. See S.D. Codified Laws Ann. chs. 10-28 through 10-37 (1982).[4] Each chapter sets up its own special regime for the particular enterprise, and there are substantial differences in the operation of the taxes. Some measure the value of property by reference to gross receipts (*e.g.*, *id.* §§ 10-31-2, 10-33-11 and 10-35-9), others by partial reference to the value of franchises and privileges (§§ 10-33-11 and 10-35-9), still others by partial reference to stock and bond values (§§ 10-28-13 and 10-34-3). In the case of the flight property tax, value is measured by a complicated formula that apportions the value of aircraft used both within and without the state (§ 10-29-10). The language used to describe the various centrally-assessed taxes also differs. Several taxes are expressly denominated as being "in lieu of" other taxes (*e.g.*, §§ 10-32-4(6), 10-33-26 and 10-34-15), other chapters state that the

[4] The provisions are chapters 10-28 (Railroad Operating Property), 10-29 (Airline Flight Property), 10-31 (Private Car-Line Companies), 10-32 (Express Companies), 10-33 (Telephone Companies), 10-34 (Telegraph Companies), 10-35 (Electric, Heating, Water and Gas Companies), 10-36 (Rural Electric Companies), 10-36A (Rural Water Supply Companies), and 10-37 (Pipeline Companies). A separate administrative procedure for each of these centrally-assessed taxes is established in Chapter 10-38.

taxes are to be centrally assessed "and not otherwise" (§§ 10-28-1, 10-29-2 and 10-35-2), and one chapter says only that the property shall be taxed "as herein provided" (§ 10-37-1).

Despite these superficial differences, all of these taxes share one common attribute—they are specially imposed on a particular type of enterprise through a central assessment that displaces the otherwise applicable method of taxation. In our view, the South Dakota circuit court correctly concluded that each of these taxes is an "in lieu" tax in the sense that it sets forth the exclusive method of taxing a particular type of property, to the exclusion of all other methods actually or potentially applicable. We believe that Congress used the term "in lieu tax" as a descriptive phrase to refer to special taxes targeted at particular interstate industries. South Dakota's flight property tax, which is paid exclusively by interstate air carriers, is thus an "in lieu tax" within the meaning of 49 U.S.C. App. 1513(d)(3).

2. For the reasons stated above, Congress did not intend to shield South Dakota's flight property tax from scrutiny under Section 1513(d) on the ground, without more, that it is an "in lieu tax" rather than a generally-applicable ad valorem property tax. Section 1513(d)(3), however, establishes a standard for assessing the reasonableness of certain in lieu taxes. It provides that Section 1513(d)(1) "shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes." It appears to be undisputed that South Dakota's flight property tax is so utilized. South Dakota's law mandates that all flight property tax revenues be allocated to the airports at which the taxed airlines make regularly scheduled landings; the formula governing this allocation ensures that each airline's taxes will be directed more or less ratably to a given airport depending on the airline's actual use of that airport. See S.D. Codified Laws Ann. § 10-29-15 (1982). The state law further provides that "the taxes imposed by this chapter * * * shall be used exclusively by such airports for airport purposes" (*ibid.*). South Dakota's flight property tax is thus an "in lieu tax which is wholly utilized for airport and aeronautical purposes" and hence is valid under the proviso set forth in Section 1513(d)(3).

This conclusion is not altered by the fact that South Dakota no longer collects a locally-assessed ad valorem personal property tax. Despite the repeal of that levy, it remains true that the flight property tax is a special, centrally-assessed tax that applies exclusively to a single type of enterprise, a tax that is imposed in lieu of other taxes actually or potentially applicable. The flight property tax, of course, cannot be said to be "equivalent" in any sense to the locally-assessed tax now that the latter has been repealed (although there is no reason to doubt that the flight property tax is roughly equivalent to the other in lieu taxes imposed on other utilities). But the Section 1513(d)(3) proviso does not impose an equivalency test, or even a nondiscrimination test. Rather, it says that the usual nondiscrimination formulas of Section 1513(d)(1) are called off when the proceeds of an in lieu tax are "wholly utilized for airport and aeronautical purposes." That is the case here. Indeed, if the validity of an airline "in lieu tax" devoted to airport purposes hinged on its equivalence to property taxes paid by other businesses, there would have been no point in Congress's including the Section 1513(d)(3) proviso, for such an "in lieu tax" would pass muster under the general nondiscrimination rules of Section 1513(d)(1).

3. Our construction of the Section 1513(d)(3) proviso is fully consonant with Congress's purpose in enacting the statute. Section 1513(d) is designed to prohibit state taxes that unreasonably burden interstate commerce. It is quite logical to conclude that South Dakota's tax on interstate aircraft, whose modest proceeds—$195,000 from all airlines for 1983 (J.S. App. 26a)—are devoted exclusively to airport improvement, does not burden interstate commerce. More specifically, the thrust of Section 1513(d) in prohibiting discriminatory taxation is to ensure that interstate carriers are not required to pay more than their fair share to support the general welfare of the state. Congress intended that interstate carriers, whom it found to be "easy prey" for local tax assessors because they could not vote with their feet, or even vote at all (S. Rep. 91-630, *supra*, at 3), should not be made to subsidize general ratepayers by paying, in effect, for services that the carriers do not receive. Where a discriminatory property tax is levied on an airline or railroad, the discriminatory portion of the tax represents a direct subsidy paid by the carrier to defray the costs of social services (such as fire protection, garbage collection, and schools) consumed by the general citizenry.

The situation is altogether different where (as here) a special-purpose tax is levied on a particular industry, with all the revenues being recycled to benefit that particular industry. South Dakota's flight property tax does not require airlines to subsidize general welfare spending, because the proceeds of the tax are spent exclusively on airports. Conversely, the fact that airlines alone pay the flight property tax does not unfairly burden them (or burden interstate commerce), because the airlines directly benefit from the tax via improvements to the facilities in which they conduct their business. For these reasons, the flight property tax cannot be said to "discriminate" against airlines in the sense that Congress sought to prohibit.[5]

What appellants actually seek in this case is not freedom from discrimination, but rather a requirement that South Dakota discriminate in their favor. To the extent that airlines have personal property (other than aircraft) in South Dakota that was for-

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[5] The legislative history of the Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31(a)(1), 94 Stat. 823, which enacted a ban on discriminatory state taxation of motor carriers (49 U.S.C. 11503a) similar to that involved here, shows that Congress did not view as a threat to interstate commerce taxes imposed on a particular industry, where the revenues are set aside exclusively for the maintenance and improvement of facilities used by that industry. The House Report on that law (H.R. Rep. 96-1069, 96th Cong., 2d Sess. 45 (1980)) states: "The provisions of [49 U.S.C. 11503a] do not apply to that body of taxes known as highway user taxes that are levied on owners or operators of motor vehicles because of their use of public highways. * * * [T]he proceeds of these taxes, for the most part, are expended through a State highway fund or otherwise earmarked for highway construction, maintenance, or operation." The absence from the Motor Carrier Act, as from Section 1513(d), of the railroad Act's catch-all prohibition against "any other tax which results in discriminatory treatment of a common carrier by railroad" (Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306, 90 Stat. 54, recodified at 49 U.S.C. 11503(b)(4)), reflects Congress's intent to preserve such special-purpose taxes paid by motor carriers and airlines and used to fund highways and airports, respectively. There is, generally speaking, no analogous species of tax paid by railroads, since railroad tracks and stations, unlike highways and airports, historically have been privately, rather than publicly, owned.

merly subject to the locally-assessed property tax, airlines received the same benefit from the 1978 repeal of the locally-assessed tax that other commercial taxpayers received. The only tax that now remains on airline property is the flight property tax. Appellants' argument in essence is that South Dakota cannot subject them to a flight property tax, the proceeds of which are used exclusively to pay for airports, unless South Dakota subjects all other businesses in the State to a personal property tax, the proceeds of which would necessarily be used to pay for general welfare spending. But since appellants benefit proportionately from general welfare spending, as well as benefiting disproportionately from airport spending, the logic of their position is that everybody else in the state should subsidize *them*.[6] Section 1513(d) was not intended to require, and does not in fact require, this sort of discrimination.

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[6] Airline passengers, of course, do contribute to the maintenance of airports by paying taxes incorporated into the airline tickets they purchase, the proceeds of which go into the federal airport trust fund. See 26 U.S.C. 4261-4263, 7275; 49 U.S.C. App. 2201 *et seq.*

CONCLUSION

The South Dakota Airline Flight Property Tax, South Dakota Codified Laws Ann. ch. 10-29 (1982), is an "in lieu tax" within the meaning of 49 U.S.C. App. 1513(d)(3). The judgment of the Supreme Court of South Dakota should be affirmed.

Respectfully submitted.

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